Supreme Court, U.S.
FILED
MAR 24 1999
CLERK

No. 98-1282

In the Supreme Court of the United States

OCTOBER TERM, 1998

FRANKS & SON, INC., on behalf of themselves and all others similarly situated
Petitioners,

v.

THE STATE OF WASHINGTON, WASHINGTON UTILITIES AND TRANSPORTATION COMMISSION, AND OFFICE OF THE STATE TREASURER
Respondents.

On Petition for a Writ of Certiorari to the Supreme Court of Washington

PETITIONER'S REPLY BRIEF

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The State's brief demonstrates the areas of common ground between the parties in this case. The State *acknowledges* the scope of the decision below: as the State recognizes, the Washington Supreme Court held that an otherwise invalid flat tax may be rendered constitutional by the simple expedient of calling it a fee and using the revenues its collects to pay the costs associated with regulatory activity. At the same time, the State makes virtually no response to our argument that the holding below is flatly inconsistent with *American Trucking Ass'ns, Inc.* v. *Scheiner*, 483 U.S. 166 (1987); it does not deny that the Washington regime imposes structural burdens on interstate commerce; and it implicitly recognizes that the issue presented here is a recurring one of great practical importance. In these circumstances, further review plainly is warranted.

A. The Washington Tax Cannot Be Reconciled With Fundamental Commerce Clause Principles

At the outset, and perhaps most fundamentally, the State does not even attempt to show that the decision below is consistent with the Commerce Clause principles applied in *Scheiner*. As we explained in the petition (at 6-12), flat taxes are unconstitutional because they impose cumulative burdens on interstate commerce, "plac[e] a financial barrier around the State," and do not "maintain state boundaries as a neutral factor in economic decisionmaking." *Id.* at 284, 283. We also showed (Pet. 13-18) that flat regulatory fees like the one imposed by Washington have precisely the same effect on interstate commerce as the flat general revenue taxes that the State concedes to be invalid, and that the fees accordingly cannot survive Commerce Clause scrutiny. The State makes *no response at all* to this point.

It therefore is no surprise that the State also makes no serious attempt to reconcile the holding below with *Scheiner*. It offers only one distinction of *Scheiner*: the claim that "the central issue in *Scheiner* was one of discrimination, not apportionment." Opp. 13. That argument, however, rests on a plain misreading of this Court's opinion. While the Court in *Scheiner* noted evidence that the Pennsylvania fee did in fact bear more heavily on interstate than on intrastate carriers (see 483 U.S. at 286-287, 296), that evidence was not essential to the Court's holding. To the contrary, the Court specifically held that, wholly apart from any evidence of discriminatory impact, the challenged fee was unconstitutional because it "exert[ed] an inexorable hydraulic

pressure on interstate businesses to ply their trade within the State that enacted the measure rather than 'among the several States.'" *Id.* at 286-287 (citation omitted). The lack of necessity for any factual demonstration of discriminatory operation is confirmed by *Oklahoma Tax Comm'n* v. *Jefferson Lines, Inc.*, 514 U.S. 175, 185 (1995), which held that "[a] failure of internal consistency shows as a matter of law" that a tax is malapportioned. See also Hellerstein, *State Taxation of Interstate Business: Perspective on Two Centuries of Constitutional Adjudication*, 41 Tax Law. 37, 71 (1987) (emphasis added) (the Court in *Scheiner* relied on internal inconsistency as a ground for invalidating the flat tax).[1]

B. Fees Are Not Exempt From The Apportionment Requirement

In arguing that the holding below nevertheless is reconcilable with this Court's decisions, the State essentially ignores *Scheiner* and contends that special purpose fees should be accorded different treatment from general revenue taxes, asserting that "the distinction between 'taxes' and 'fees' has been a comfortable one in a variety of modern contexts." Opp. 10. The State has some difficulty, however, in explaining why that distinction should have any relevance in the Commerce Clause setting. Revealingly, the State does *not* defend the Washington Supreme Court's analysis, which turned on the proposition — an absurd one, in our view (see

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[1] The State asserts that the Washington tax did not in fact discriminate between interstate and intrastate carriers and that the trial court so found. Opp. 9. While the question of discrimination is analytically distinct from the apportionment issue presented here, the State is incorrect on its own terms. As explained at Pet. 3-4 n.4, the trial court simply found that discrimination had not been established at the summary judgment stage. As for the merits of the State's repeated assertion that its levy does not discriminate against interstate commerce (*e.g.*, Opp. ii, 15), the State makes no response to this Court's observation that flat taxes *necessarily* discriminate because "'[i]n the general average of instances, the privilege [paid for by the levy] is not as valuable to the interstate as to the intrastate carrier.'" *Scheiner*, 483 U.S. at 291 (citation omitted). Obviously, when petitioner's trucks are operating in other states, they can hardly avail themselves of the privilege to operate in Washington, or indeed create a need for regulatory response by Washington to their activities.

Pet. 16-17) — that special purpose fees impose less of a burden on interstate commerce than do general revenue taxes. Instead, the State finally hits on the argument that flat special purpose fees are permissible, despite their cumulative impact on interstate businesses, because every "state[] has a right to protect its citizens from unsafe trucks and inspect the trucks on the way through [the State]." Opp. 15-16. This analysis is flawed on several levels.

First, as we note in the petition (at 17 n.12) and as *amicus* American Trucking Associations ("ATA") explains at greater length in its brief supporting certiorari (at 6-12), the fact that the distinction between general revenue taxes and special purpose fees is relevant for some purposes hardly means that it is controlling for all. Instead, whether that distinction has any bearing in a given context plainly should turn on the particular constitutional or statutory concerns at stake. And for the reasons noted above, nothing in the Commerce Clause justifies differing treatment for the two types of levies; they impose identical burdens on interstate commerce. Indeed, that proposition was settled by *Scheiner* itself, which invalidated a dedicated special purpose truck fee that was used to finance road-related expenditures and that was identical in all relevant respects to the Washington tax. Although we made that point in the petition (at 16), the State offers no response.[2]

Second, the State misunderstands the nature of the dedicated fees that have survived Commerce Clause attack. The Court has upheld per-use fees (like highway tolls) and other levies calibrated to charge for the value of services or benefits provided to the individual feepayer — but it has done so because such fees *are* properly apportioned and *do* pass the internal consistency test. The one-dollar airport enplaning fee at issue in *Evansville-Vanderburgh Airport Auth. Dist.* v. *Delta Airlines, Inc.*, 405 U.S. 707 (1972), is an example. That fee did not impose commercial barriers around the taxing state because it "maintain[ed] state boundaries as a neutral factor in economic decisionmaking"

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[2] The court below distinguished *Scheiner* on the ground that fees used to pay for regulatory activity are more burdensome than dedicated fees that are used for other purposes. As we note above, however, the State evidently has abandoned the state court's rationale. Having done that, the State has neglected to offer any other distinction of *Scheiner*.

(*Scheiner*, 483 U.S. at 283); if such a fee were imposed by every taxing jurisdiction in the Nation, the amount paid would vary according to the number of flights taken (whether interstate or intrastate), not the number of state boundaries crossed. The Court therefore held the levy constitutional, noting that the charge "'reflect[ed] a fair, if imperfect, approximation of the use of facilities for whose benefit [it is] imposed.'" *Id.* at 290 (quoting *Evansville-Vanderburgh*, 405 U.S. at 717).[3]

The Washington tax, however, was not of this character. While Washington asserts that its levy was "fairly related to the burdens placed on the state" (Opp. 15), it means by this statement that all fee revenues *in the aggregate* were used to pay for Washington's regulatory program; the State determined how much money it needed and then imposed a flat, annual tax that would raise the requisite amount. See Opp. 5. By definition, such a fee *cannot* reflect a reasonable approximation of the *individual feepayer's* use of state services. The State implicitly acknowledges (Opp. 15-16) the correctness of our argument that this sort of levy

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[3] The fee at issue in *Northwest Airlines, Inc.* v. *County of Kent*, 510 U.S. 355 (1994), cited by the State at Opp. 13-14, also involved a fee that was apportioned because it approximated the value of the services provided by the taxing jurisdiction to the feepayer. See 510 U.S. at 859 (feepayer charged "only for the cost of providing the particular facilities and services they use"). The older cases cited by the State (at Opp. 11-12) offer it no more support. *Clyde Mallory Lines* v. *Alabama*, 296 U.S. 261 (1935), for example, involved a per-use harbor fee whose reasonableness was not questioned. *Id.* at 263. *Dean Milk Co.* v. *City of Madison*, 340 U.S. 349, 344-345 (1951), indicated only that the city could charge interstate businesses for the "actual and reasonable cost" of services provided to those businesses. And *Sprout* v. *South Bend*, 277 U.S. 163, 170 (1928), expressly noted that "[a] flat tax, substantial in amount and the same for busses plying the streets continuously in local service and for busses making, as do many interstate busses, only a single trip daily, could hardly have been designed as a measure of the cost or value of the use of the highways." In any event, to the extent that any of these decisions are read to authorize flat taxes more broadly, they cannot survive *Scheiner*. Indeed, several of the cases cited by the State (*Clyde Mallory Lines*, 296 U.S. at 268, and *Sprout*, 277 U.S. at 169) relied upon *Clark* v. *Poor*, 274 U.S. 554 (1927), a decision that was specifically disapproved in *Scheiner*. See 483 U.S. at 292-297.

accordingly fails the internal consistency test and imposes disproportionate, cumulative burdens on interstate commerce, while allowing the taxing jurisdiction to export much of its tax burden to interstate taxpayers.

To be sure, the State is correct in observing (Opp. 15-17) that interstate businesses may be made to pay their own way. But they may not be made to pay the way of in-state businesses. Accordingly, in collecting from interstate businesses, a State may levy only the taxpayer's fair share — and as a matter of law, an unapportioned levy "attempt[s] to take *more* than its fair share of taxes from the interstate transaction." *Jefferson Lines*, 514 U.S. at 185 (emphasis added). In the setting of this case, Washington could have apportioned its levy by mileage, or by charging per safety inspection conducted, or by numbers of pickups and deliveries in the State, or by any other reasonable method that did not inherently expose the interstate trucker to duplicative assessments. Its failure to do so rendered its tax unconstitutional.[4]

In fact, the State's confusion about the import of *Scheiner* and related decisions demonstrates the importance of further review. Washington's approach, endorsed by the holding below, would gravely weaken *Scheiner*, offering States a roadmap for evading Commerce Clause principles. Nor can the State successfully minimize the radical scope of the holding below by asserting (Opp. 16-17) that our approach would strike down hunting licenses and analogous fees. Many such fees do not violate apportionment requirements because they are calibrated to charge each feepayer for the value of services provided, and others may be valid

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[4] In this regard, the State's contention (Opp. 3, 4) that there are differences between interstate and intrastate carriers is beside the point. If such distinctions in fact exist, they would be taken into account by a properly apportioned tax (for example, one that was imposed per inspection conducted). But such distinctions would not justify disregarding the apportionment requirement and allowing the State to take more than its fair share of tax. For the same reason, the State's contention (Opp. 17) that apportionment would have intrastate carriers pay more than their fair share is wrong; by definition (not to mention by common sense), apportionment is necessary to assure that interstate carriers do not pay too much — and that intrastate businesses do not pay too *little*.

because they involve circumstances where apportionment is impracticable — and, of course, this Court has not in modern times upheld such fees when they are unapportioned. In any event, whatever the validity of such fees, the one thing that *is* clear is that levies on interstate transportation must be apportioned. The holding below cannot be reconciled with that rule.

C. The Lower Courts Are In Conflict On The Question Presented Here

The State errs in its assertion (Opp. 18-20) that the lower courts are not in conflict on the question presented here. The State correctly acknowledges that several courts have endorsed the analysis used by the Washington Supreme Court in this case. But its claim that no courts have rejected that approach is untenable.

The State attempts (Opp. 18-19) to distinguish *American Trucking Ass'ns* v. *Secretary of State*, 595 A.2d 1014 (Me. 1991), on the ground that only a portion of the fee in that case was devoted to regulatory purposes, with the remainder used to defray other costs imposed upon Maine by the feepayers. See Pet. 20-21. But having abandoned the rationale that fees used for regulatory purposes are more burdensome than other dedicated fees, the State does not even attempt to demonstrate why this distinction makes any difference. The State also does not, and could not, explain how the holding below may be reconciled with the analysis used by the Maine court, which turned on the conclusion that a levy is unconstitutional, whether or not it is designated a "[r]egulatory [l]icense [f]ee," so long as it violates the internal consistency test. 595 A.2d at 1015, 1017.

As for *American Trucking Ass'ns, Inc.* v. *Secretary of Administration*, 613 N.E.2d 95 (Mass. 1993), the State asserts (Opp. 19) that the Massachusetts court relied on the conclusion that "'local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks,'" adding that no such finding has been made here. Opp. 19, quoting 613 N.E.2d at 101. In fact, the Massachusetts holding is in direct conflict with the Washington court's decision. The State does not deny that the fees at issue in the two cases were essentially identical. And the Massachusetts court did not rely on any finding of discrimination grounded in the record. To the contrary, in a portion of its opinion omitted by the State, the court expressly

noted that, "[a]lthough the discriminatory impact of the fees is not precisely quantifiable because the stipulated facts do not include statistics regarding the average number of miles traveled annually in Massachusetts by local trucks and by those registered in other jurisdictions, *it is intuitively obvious* that local trucks derive far greater economic benefit from each of the challenged fees paid than do interstate trucks." 613 N.E. at 101 (emphasis added). The same thing is intuitively obvious here.[5]

Finally, the State acknowledges that *Government Suppliers Consolidating Servs., Inc.* v. *Bayh*, 975 F.2d 1267 (7th Cir. 1992), cert. denied, 506 U.S. 1053 (1993), "contains language supporting Petitioner's argument," although the State labels the Seventh Circuit's analysis dictum because the fees at issue in that case purportedly were "'part and parcel'" of a regulatory "backhaul ban" held unconstitutional on other grounds. Opp. 19 (quoting 975 F.2d at 1281). But that is a misreading of *Government Suppliers*. The Seventh Circuit found that the challenged fees had purposes in addition to furthering the backhaul ban and that it accordingly had to engage in an independent examination of the fees' validity under *Scheiner*. See *id.* at 281. The conflict in holdings therefore is inescapable.

D. The Issue Presented Here Is Important And Recurring

The State cannot deny that the issue presented here is an important and recurring one. *First*, it concedes (albeit reluctantly) that jurisdictions across the Nation continue to impose flat fees of various kinds on interstate carriers, and that many of these fees are used for regulatory and safety purposes identical to those found dispositive by the court below. While the State makes the conclusory claim that some of these fees may present unspecified "different concerns" from those raised by the Washington tax

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[5] The State also asserts (Opp. 19) that the rule in Massachusetts is consistent with the holding below because, in *Aloha Freightways, Inc.* v. *Commissioner of Revenue*, 701 N.E.2d 961 (1998), the Massachusetts court upheld a tax that included a *de minimis* exception. The Washington regime, however, does not offer any trucker a complete tax exemption. In any event, the court below did not rely on the availability of floater cards and single trip permits in holding that the tax need not satisfy the apportionment requirement.

(Opp. 21), it is unable to articulate what those concerns might be, or how the constitutional principles governing those levies would differ in any respect from the ones at play here.

Second, Washington does not deny that many States have engaged in a continuing campaign to evade the requirements of *Scheiner*, and it cannot deny that the holding below will provide powerful support for those efforts. Again, Washington confines itself to the wholly conclusory (and plainly insupportable) assertion that the constitutional principles announced in this case will not be thought to have any bearing in suits involving other flat exactions. That assertion simply ignores the painful history of post-*Scheiner* litigation that is recounted in the petition and in ATA's *amicus* brief.

Third, Washington dismisses the importance of providing appropriate guidance to state and local governments about the rules governing their taxing authority, suggesting that States may protect themselves against retroactive liability by limiting refund rights through the use of short statutes of limitations. Opp. 21-22. But Washington cannot deny that the decision below will leave legislators in doubt about the rules governing state and local taxation, which surely is not a desirable state of affairs. And it is small comfort to know that taxing jurisdictions that are lulled by the Washington court's decision into enacting (or maintaining) unconstitutional levies may invoke procedural devices that will deny taxpayers an opportunity to vindicate their federal constitutional rights.

Fourth, the State finds no significance in the Washington courts' assertion of transparently insubstantial grounds with which to frustrate petitioner's rights under the Commerce Clause, contending that additional questions would have to be resolved on remand before petitioner and other members of the plaintiff class would obtain refunds. That the State intends to dream up new and palpably insupportable arguments against relief on remand, however, is no reason for this Court to deny review now[6] — an

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[6] The State asserts that "unrebutted" evidence below established that a flat fee was the only practicable means of collecting a tax, and that the Washington tax therefore is permissible under *Scheiner*. Opp. 22. But that is preposterous. Not only may the function in question be funded by

outcome that would leave in place a holding that confuses the law and defies this Court's precedents.

For the foregoing reasons and those stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

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one of the types of apportioned levies described above, but it may be paid for by increasing any of the several other apportioned assessments Washington already imposes on truckers, such as fuel taxes and registration fees. Indeed, the trial court in this case held the tax *invalid* under *Scheiner* (see Pet. 3), a conclusion that necessarily required a finding that apportionment of the tax *was* practicable.